IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND ZONG,	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 14-6010**
MERRILL LYNCH/BANK OF AMERICA,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM

Tucker, C.J. **July 24, 2017**

Before the Court are Plaintiff Raymond Zong's Complaint (ECF No. 1), Defendant Merrill Lynch's Motion to Dismiss Zong's Complaint (ECF No. 26), Plaintiff, Raymond Zong's Response Against Merrill Lynch's Motion (ECF No. 27), and Plaintiff's Supplements to Zong's Response (ECF No. 28). Upon consideration of the Parties' submissions, Defendant's Motion to Dismiss is GRANTED and Plaintiff Raymond Zong's Complaint (ECF No. 1) is DISMISSED WITH PREJUDICE.

I. FACTUAL AND PROCEDURAL BACKGROUND

The present lawsuit is the second lawsuit that Plaintiff has brought against his former employer, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), for claims relating to Merrill Lynch's alleged racial discrimination and retaliation against Plaintiff. The Court ultimately concludes that the present suit is barred by the doctrine of res judicata because Plaintiff's prior suit ended in a final judgment on the merits, the prior suit was brought against the same defendant, and the prior suit involved the same cause of action that is at issue in the present suit.

A. Prior Suit: *Zong v. Merrill Lynch, Pierce, Fenner & Smith Inc., a wholly-owned subsidiary of Bank of America,* No. 13-3256

1. Underlying Facts: Alleged Discrimination and Retaliation

Plaintiff is Chinese and his native language is Chinese. Second Am. Compl. ¶ 14, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9; *see also* Pl.'s Resp. in Opp. to Mot. to Dismiss ¶ 3, *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Oct. 23, 2014), ECF No. 27 (explaining that Plaintiff's native language is Chinese). In 2006, Merrill Lynch hired Plaintiff as a financial advisor. Second Am. Compl. ¶ 12, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9. Beginning in 2010, Plaintiff's white coworkers allegedly began harassing Plaintiff because of his race. *Id.* at ¶ 13. Among other things, Plaintiff's colleagues directed Plaintiff not to speak Chinese with his clients despite the fact that Plaintiff's job duties often required him to speak Chinese with many of his Chinese-speaking clients. *Id.* at ¶¶ 17, 22; *see also* Pl.'s Resp. in Opp. to Mot. to Dismiss ¶ 3, *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Oct. 23, 2014), ECF No. 27 (explaining that Plaintiff held the title of International Financial Advisor and was authorized to speak Chinese with his clients). Indeed, Plaintiff's manager allegedly acknowledged that Plaintiff's coworkers may have been intentionally harassing Plaintiff. Second Am. Compl. ¶ 24, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9. Although Plaintiff reported this and other incidents of alleged hostility and harassment to Merrill Lynch, Merrill Lynch purportedly did nothing. *Id.* at ¶ 25.

On February 15, 2012, Plaintiff filed a charge with the Equal Employment Opportunity Commission alleging that Merrill Lynch engaged in discrimination based on race and national origin. *Id.* at ¶ 33. After Plaintiff's filing, Merrill Lynch transferred Plaintiff to a new office location away from the coworkers who had been harassing Plaintiff. *Id*. at 5 ¶ 34. Despite the

transfer, Merrill Lynch allegedly continued to discriminate against Plaintiff in a variety of ways. *Id.* at ¶¶ 35–37. As a result of this alleged discrimination, on April 2, 2012, Plaintiff resigned. *Id.* at ¶ 38.

On June 12, 2013, Plaintiff filed a complaint against Merrill Lynch alleging that Merrill Lynch engaged in, among other things, race discrimination and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000, *et seq*. Compl. ¶¶ 18–25, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. June 12, 2013), ECF No. 1.[1] After some time, the Parties agreed to explore settlement options, and the case was referred to United States Magistrate Judge Richard A. Lloret to conduct a settlement conference. Order, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. June 4, 2014), ECF No. 32.

2. Settlement Agreement and September 22, 2014 Entry of Final Judgment

On June 23, 2014, the Parties appeared for a settlement conference before Judge Lloret. Min. Sheet, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. June 24, 2014), ECF No. 35. During the settlement conference, the Parties reached a mutually-agreeable, final settlement and placed their agreement on the record. *See* Mem. Op., *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Sept. 22 2014), ECF No. 57 (summarizing result of settlement conference). The next day, Plaintiff contacted Judge Lloret by email in an attempt to renege on the settlement agreement. *Id.* Plaintiff sought to renege on the agreement because his attorney purportedly misled Plaintiff during the settlement conference. *Id.* at 2–3.

[1] On July 3, 2013, Plaintiff filed an amended complaint to add a cause of action under the Pennsylvania Human Relations Act. Am. Compl., *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. July 3, 2013) ECF No. 2. On November 13, 2013, Plaintiff filed a second amended complaint to add a cause of action under the Wage Payment and Collections Act and a cause of action for Breach of Contract. Second Am. Compl., *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9.

After Plaintiff refused to honor the settlement agreement, Merrill Lynch filed a Motion to Enforce Settlement. Merrill Lynch's Mot. to Enforce Settlement, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. June 30, 2014), ECF No. 39. The Parties stipulated to Judge Lloret's jurisdiction. Consent, and Reference of a Civil Action to a Magistrate Judge, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Sept. 4, 2014), ECF No. 55. Judge Lloret then ordered that the Parties appear for a hearing on the Motion to Enforce Settlement. After the hearing, on September 22, 2014, Judge Lloret issued an Order ("September 22 Order") and Memorandum Opinion whereby he granted the Motion to Enforce Settlement and dismissed Plaintiff's case with prejudice in accordance with the Parties' on-the-record settlement agreement. Mem. Op., *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Sept. 22, 2014), ECF No. 57; Order, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Sept. 22, 2014), ECF No. 58. Plaintiff appealed the September 22 Order.

On December 1, 2015, the United States Court of Appeals for the Third Circuit affirmed the September 22 Order. *See generally Zong v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 14-4239 (3d Cir. Dec. 1, 2015). Plaintiff then sought to appeal the Third Circuit's decision to the United States Supreme Court by Petition for Writ of Certiorari. On April 24, 2017, the United States Supreme Court denied Plaintiff's Petition for Writ of Certiorari. *Zong v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 137 S. Ct. 1812 (2017).

B. Present Suit: *Zong v. Merill Lynch/Bank of America,* No. 14-6010

On October 23, 2014, while Plaintiff's appeal of the September 22 Order was pending before the Third Circuit, Plaintiff filed the present Complaint against Merrill Lynch under a new civil action number, No. 14-6010. *See generally* Compl., *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Oct. 23, 2014), ECF No. 1. Plaintiff's Complaint set forth a

cause of action for violation of Title VII of the Civil Rights Act relating to Merrill Lynch's alleged retaliation against Plaintiff and constructive discharge. *Id.* at 2. In addition to alleging the same cause of action against the same Defendant, Plaintiff also alleged the same core set of facts in his new Complaint that he alleged in his prior complaints. *See generally id.*

On December 12, 2014, the present case was stayed pending the outcome of Plaintiff's appeal of the September 22 Order in Plaintiff's prior suit. Order, *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Dec. 12, 2014), ECF No. 11. Later, after the United States Supreme Court's dismissal of Plaintiff's Petition for Writ of Certiorari in the prior suit, Defendant filed the instant Motion to Dismiss. Merrill Lynch's Mot. to Dismiss Zong's Compl., *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. May 24, 2017), ECF No. 26.

II. STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). A complaint is plausible on its face when its factual allegations allow a court to draw a reasonable inference that a defendant is liable for the harm alleged. *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010). A court must accept as true all factual allegations contained in a complaint and interpret them in the light most favorable to the plaintiff. *Argueta v. U.S. Immigration & Customs Enf't*, 643 F.3d 60, 74 (3d Cir. 2011).

III. DISCUSSION

Defendant asserts that the doctrine of res judicata applies to the present facts and, therefore, Plaintiff's Complaint must be dismissed. The Court agrees.

At the outset, the Court notes that in Plaintiff's response in opposition to the Motion to Dismiss, Plaintiff highlights various events in the course of his employment with Merrill Lynch and in the course of his prior suit that have not pled. At the motion to dismiss stage, however, this Court is constrained to the pleadings before it and is, in any event, limited by the final judgment reached in Plaintiff's prior suit as affirmed by the Third Circuit Court of Appeals as explained in greater detail below.

As to the matter presently before the Court, the doctrine of res judicata, "also known as claim preclusion, bars a party from initiating a second suit against the same adversary based on the same 'cause of action' as the first suit." *McLaughlin v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, No. 16-4108, 2017 WL 1325687, at *2 (3d Cir. Apr. 11, 2017) (citing *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008)). The doctrine also bars claims that could have been brought in the first suit. *See Morgan v. Covington Tp.*, 648 F.3d 172, 177 (3d Cir. 2011) (quoting *In re Mullarkey*, 536 F.3d at 225) (providing that res judicata "promotes judicial economy and protects defendants from having to defend multiple identical or nearly identical lawsuits by 'bar[ring] not only claims that were brought in a previous action, but also claims that could have been brought'"). Though a claim of res judicata must generally be raised as "an affirmative defense," it may properly be asserted in a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure when application of the doctrine and, thus, dismissal, is "apparent on the face of the complaint." *Rycoline Prods., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997).

To assert that a legal matter is barred by the doctrine of res judicata successfully, the defendant "must establish three elements: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies, and (3) a subsequent suit based on the same cause

of action." *Morgan*, 648 F.3d at 177 (citing *In re Mullarkey*, 536 F.3d at 225). As to the first element, it is well-recognized that "[j]udicially approved settlement agreements are considered final judgments on the merits for the purposes of claim preclusion." *Conceicao v. Nat. Water Main Cleaning Co.*, 650 F. App'x 134, 135 (3d Cir. 2016) (citing *Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995)).

In determining whether res judicata bars a suit on a motion to dismiss, the court must, of course, accept all well pled facts in the complaint as true, however, the court may also take notice of matters outside the complaint that are of public record. *Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 280 n.52 (3d Cir. 2016). For example, the court may consider court-filed documents such as complaints, because complaints are matters of public record. *Id*.

In the present case, Defendant has successfully established each of the three elements of res judicata. First, in the prior suit titled *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256, United States Magistrate Judge Richard A. Lloret entered a final judgment on the merits on September 22, 2014 when he issued the September 22 Order. The September 22 Order constituted a final judgment on the merits on its face not only because it provided that the case was "DISMISSED WITH PREJUDICE," but also because the order affirmatively approved and enforced the on-the-record settlement agreement that had been reached by the Parties at the May 27, 2014 settlement conference before Judge Lloret. Order, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Sept. 22, 2014), ECF No. 58. As explained above, such judicially-approved settlement agreements constitute final judgments for the purposes of res judicata.

Second, the parties involved in the prior suit are the same parties involved in the present suit. In the prior suit, Plaintiff Zong sued his former employer, Defendant Merrill Lynch, Pierce,

Fenner & Smith, Inc., a wholly-owned subsidiary of Bank of America Corp. In the present suit, Plaintiff Zong sued his former employer, Defendant Merrill Lynch/Bank of America. Between the prior suit and the present suit, the parties are identical. Moreover, between the prior and present cases the parties are identically situated with Zong as Plaintiff in both cases, and his employer Merrill Lynch/Bank of America Corp. as Defendant in both cases.

Third, the present suit is based on the same cause of action as the prior suit. In the prior suit, Zong filed suit against Merrill Lynch alleging violations of "Title VII of the Civil Rights Act (42 U.S.C. § 2000e, *et.* [sic] *seq*.)". Second Am. Compl. at ¶ 1, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9. In the present suit, Zong filed a suit against Merrill Lynch/Bank of America alleging violations of "Title VII (42 U.S.C. § 2000e, *et seq*)." Compl. 2, *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Oct. 23, 2014), ECF No. 1. Thus, on its face, the causes of action between the prior and present law suit are the same. Further, the factual allegations contained in the Second Amended Complaint in the prior suit and the Complaint in the present suit are substantively, and in most instances formally, the same. For example, in the Second Amended Complaint, Plaintiff alleged:

> 16. On February 15, 2012, Plaintiff filed a charge for employment discrimination with the Equal Employment Opportunity Commission ("EEOC") in Philadelphia on the basis of race discrimination and retaliation (EEOC Charge No. 530-2012-01276). This EEOC Charge was cross-filed with the Pennsylvania Human Relations Commission ("PHRC") on May 14, 2012.

Second Am. Compl. at ¶ 16, *Zong v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 13-3256 (E.D. Pa. Nov. 13, 2013), ECF No. 9.

In the present Complaint, Plaintiff alleged, using nearly identical language, that:

> 1. On February 15, 2012, Plaintiff filed a charge for employment discrimination with the Equal Employment Opportunity Commission ("EEOC") in Philadelphia on the basis of race discrimination and retaliation (EEOC Charge No. 530-2012-01276). It was cross-filed with the Pennsylvania Human Relations Commission (PHRC) on May 14, 2012.

Compl. 2, *Zong v. Merrill Lynch/Bank of America*, No. 14-6010 (E.D. Pa. Oct. 23, 2014), ECF No. 1. Thus, not only are the substantive allegations identical between the prior suit and the present suit, most of the language used in the present Complaint is taken directly and verbatim from the Second Amended Complaint of Plaintiff's prior suit. These similarities demonstrate that the legal claims are the same between the two suits.

In short, the Court concludes that Plaintiff Raymond Zong's present suit is barred by the doctrine of res judicata because Zong's prior suit was dismissed with prejudice upon the entry of a final judgment on the merits, Zong's prior suit was filed against the same defendant as the defendant in the present case, and the present Complaint alleges the same cause of action that was adjudicated in Zong's prior suit.

IV. CONCLUSION

For the reasons set forth above, Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Motion to Dismiss Zong's Complaint (Doc. 26) is GRANTED and Plaintiff Raymond Zong's Complaint is DISMISSED WITH PREJUDICE. An appropriate Order follows.